83-546

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

CLAYCO PETROLEUM CORPORATION
and BRUCE CLAYMAN,

Petitioners,

vs.

OCCIDENTAL PETROLEUM CORPORATION,
OCCIDENTAL OF UMM AL QAYWAYN, INC.
and ARMAND HAMMER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: September 30, 1983

Questions Presented

1. Does the act of state doctrine automatically require dismissal of a private antitrust action, brought solely against American citizens for conspiracy to restrain trade by making improper payments to the oil minister of an Arab Sheikdom, because one element of plaintiff's claim involves consideration of the motivation for, but not the validity of, a foreign sovereign's grant of an oil concession? (The Ninth Circuit held that dismissal was required).

2. Does the Foreign Corrupt Practices Act of 1977, by expressing a legislative judgment that United States foreign policy is best served by holding American citizens accountable for corrupt payments to foreign officials, remove the act of state defense in cases involving corrupt foreign payments, to the extent such defense rests on foreign policy con-

siderations? (The Ninth Circuit held that the Foreign Corrupt Practices Act did not remove an act of state defense in such circumstances).

Parties to the Proceeding

All parties to this proceeding appear in the caption of the case in this Court.

TABLE OF CONTENTS

Table of Authorities

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners, Clayco Petroleum Corporation and Bruce Clayman, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on August 2, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 712 F.2d 404 and at 1983-2

Trade Cas. (CCH) ¶ 65,523; the opinion appears as Appendix A.

A transcription of the unreported opinion of the District Court, delivered orally in open court on July 21, 1980, appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1983.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(i).

STATUTES AND REGULATIONS INVOLVED

Appendix E sets forth the pertinent text of the statutes and regulations which this case involves. These include Section 1 of the Sherman Act, 15 U.S.C. § 1; Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(c); The Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq; and the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, 2 and 78ff.

STATEMENT OF THE CASE

Petitioners commenced this action on October 4, 1979, alleging violations of federal antitrust law, 15 U.S.C. §§ 1 and 13(c), the California Business and Professions Code §§ 16720 and 17045, and the common law. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1337, and principles of pendent jurisdiction.

Essentially, the complaint alleges that in September 1969 Umm Al Qaywayn, which is located in the Persian Gulf, agreed to grant petitioner Clayco Petroleum Corporation ("Clayco") a valuable oil concession; that defendants Occidental Petroleum Corporation ("Occidental"), Occidental of Umm Al Qaywayn, Inc. ("Occidental U.A.Q."), and Armand Hammer ("Hammer") (collectively, the "Occidental Defendants") conspired to make secret

payments in England and Switzerland totalling $417,000 to Sheikh Sultan bin Ahmed Muallah ("Sultan"), the oil minister of Umm Al Qaywayn and the son of Umm Al Qaywayn's ruler; and that as a result of the Occidental Defendants' unlawful and anticompetitive conspiracy and actions, the oil concession was awarded on November 18, 1969 to Occidental U.A.Q. instead of to Clayco.

Petitioners first learned why they lost the concession in December 1978. The December 11, 1978, edition of the Oakland Tribune contained a story which said that Occidental had distributed about $30 million under "questionable legal circumstances," and that Hammer, Occidental's chief executive officer, had personally disbursed $217,000 to Sultan in a London hotel room in 1969. The article also reported that a second payment of $200,000 was made to Sultan in

Switzerland. The article stated, "Hammer paid the initial $217,000 as part of a $1.7 million deal with the sheikdom . . . for an oil and gas concession."

In 1977, the Securities and Exchange Commission ("SEC") commenced an action against Occidental alleging violations of the Securities Exchange Act of 1934 and rules promulgated thereunder, based on illegal or questionable payments made by Occidental. Securities and Exchange Commission v. Occidental Petroleum Corp., No. 77-0751, (D.D.C., filed May 3, 1977). Occidental consented to the entry of a permanent injunction and agreed to conduct an internal investigation of the alleged illegal payments and to prepare for the SEC and Occidental's stockholders a special report describing such payments. Report of the Special Committee of the Board

of Directors of Occidental Petroleum Corporation, Investigated Payments and Accounting Practices of Occidental Petroleum Corporation (April 17, 1978) (the Payments Report).

The Payments Report was filed and revealed various illegal payments. A source memorandum annexed to the Payments Report further recites that Occidental's $200,000 payment in Switzerland was of "uncertain legality" and was inaccurately described and documented on Occidental's books.

This $417,000 in payments plus "entertainment" expenses constituted bribes to induce Sultan to cause the award of the oil concession to Occidental U.A.Q. in furtherance of the conspiracy among Occidental, Occidental U.A.Q. and Hammer to prevent competition and to deprive petitioners of the concession.

After oral arguments, the District Court granted the Occidental Defendants' motion to dismiss, based on the act of state doctrine. The court stated that an exercise of sovereignty -- the award of the offshore oil concession -- was implicated in the case, and that adjudication would interfere with United States foreign policy. The court noted that plaintiffs' obligation to prove that they were damaged by defendants' conduct would necessitate review of the "ethical validity" of the sovereign's conduct. The court also refused to apply a commercial exception to the act of state doctrine.

The Ninth Circuit affirmed the District Court's order, holding that the granting of an oil concession is a sovereign decision, and that judicial scrutiny of such a decision would embarrass the political branches of the United

States government in the conduct of foreign policy, even though the dispute is entirely among American citizens and no official of Umm Al Qaywayn is a party to the action.

The Ninth Circuit further held that:

(a) The act of state doctrine applied to preclude judicial scrutiny even in cases where only the motivation for, but not the validity of, foreign sovereign acts would be subject to examination.

(b) Granting a concession to exploit natural resources entails an exercise of power peculiar to a sovereign, and so cannot be classified as commercial activity within the meaning of Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

(c) The Foreign Corrupt Practices Act of 1977 does not remove the act of

state defense in private suits against American citizens based on corrupt foreign payments.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION THAT THE MOTIVATION OF A FOREIGN SOVEREIGN MAY NOT BE CONSIDERED CONFLICTS WITH THE HOLDING OF THE FIFTH CIRCUIT

Both the District Court and the Ninth Circuit found that in order to prove their damages, petitioners must show causation, i.e., that petitioners would have received the oil concession but for the Occidental Defendants' anti-competitive conspiracy. Thus, although the validity of the oil concession would never be in issue, an element of petitioners' case would involve an inquiry into the motivation for Umm Al Qaywayn's failure to grant the concession to petitioners.

This precise issue was faced by the Fifth Circuit in Industrial Investment

Development Corp. v. Mitsui & Co., 594 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980). The plaintiffs there contended, as do petitioners here, that the defendants' anticompetitive acts prevented them from securing a valuable concession from a foreign government.

The district court's grant of summary judgment against the plaintiff squarely presented the question of whether the involvement of a foreign government (Indonesia) or the need to inquire into the government's motivation in not granting a concession to plaintiffs were sufficient to trigger the act of state doctrine. "The sole issue" on appeal in Mitsui, as here, was "whether the act of state doctrine precludes a trial of plaintiffs' antitrust action." Id. at 49 (footnote omitted). The Fifth

Circuit decision reversing the district court's dismissal found that

> neither the validity of those regulations nor the legality of the behavior of the Indonesian government is in question here. The mere fact that members of the Indonesian government were to play a part in the alleged scheme does not insulate defendants' accountability for conduct which might prove to be prohibited by our antitrust laws.

Id. at 49. The Mitsui court made absolutely clear that it "disagree[d] that motivation and validity are equally protected by the act of state rubric." Id. at 55.

> Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action. Industrial Investment must only question that government's motivation to the extent of measuring its damage. No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special polit-

> ical considerations protected by the act of state doctrine.

Id.

Although the Ninth Circuit attempts to distinguish Mitsui on the basis that the motive here sought to be established is bribery, the Fifth Circuit clearly contemplated the possibility that judicial inquiry could lead to a corrupt motive. The express holding of the lower court, which the Fifth Circuit reversed, was that

> 'Once it is established that the harm complained of was ultimately caused by a government act, the motivation behind the act, no matter how unscrupulous, is beyond judicial review.'

Id. at 51 (quoting the district court; emphasis added).

Thus the Ninth Circuit's holding below that "judicial scrutiny of the motivation for foreign sovereign acts [is] precluded by the act of state

doctrine," and that petitioners herein "cannot argue that inquiry into motivation in this case is unprotected," is directly in conflict with the Fifth Circuit's holding in Mitsui.

II. THE NINTH CIRCUIT'S APPLICATION OF THE ACT OF STATE DOCTRINE IN THE PRESENT CASE CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

The "classic" definition of the act of state doctrine appears in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill involved an action directly against an agent of a foreign sovereign for refusal to grant a passport, a "state" act within a government's police powers.

In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), arising out of an alleged conspiracy to monopolize the vanadium trade, plaintiff claimed that it was eliminated from the Canadian market by an agent of the Canadian government. Id. at 702-03. This Court refused to invoke the act of state doctrine, holding that the defendants were "not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government." Id. at 706. The Court added:

> Respondents say that American Banana Co. v. United Fruit Co., 213 U.S. 347, shields them from liability. This Court there held that an antitrust plaintiff could not collect damages from a defendant who had allegedly influenced a foreign government to seize plaintiff's properties. But in the light of later cases in this Court respondents' reliance upon American Banana is misplaced. A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of

> the conduct complained of occurs in foreign countries.

Id. at 704.

The Continental Ore Court found the act of state doctrine inapplicable on certain facts also present here:

> [P]etitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller. Nor is there left in the case any question of the liability of the Canadian Government's agent, for Electro Met of Canada was not served. What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market.

370 U.S. at 706. Plaintiffs here likewise do not question the validity of any action taken by the government of Umm Al Qaywayn, nor have they asserted any claim against Sultan, Umm Al Qaywayn's agent in the transaction. As contended in Continental Ore, plaintiffs contend herein that defendants, all of whom are American

citizens, "are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of" Clayco from the Umm al Qaywayn oil market.

In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), this Court rejected the notion that the act of state doctrine "is compelled either by the inherent nature of sovereign authority . . . or by some principle of international law." Id. at 421 (citations omitted). Instead, the Court described the nature of the doctrine as follows:

> The act of state doctrine does... have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on

> the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id. at 423 (emphasis added).

The principles set forth in Sabbatino permit application of the act of state doctrine only where the validity of a foreign sovereign's act of state is directly challenged and American foreign policy would be threatened by a court's attempt to resolve that challenge. In the instant case, no allegations have been made that challenge the validity or propriety of a foreign sovereign's actions in any manner.

The Occidental Defendants made the payments in question in 1969 to the oil minister of a sheikdom that no longer exists, having since been absorbed into the United Arab Emirates. The oil minister accepted the bribes in Switzerland

and England for his personal benefit. This was not a "state" act within Umm Al Qaywayn's boundaries but the private act of an individual on foreign soil. The act of state doctrine only applies to a governmental act "done within its own territory," Underhill v. Hernandez, 168 U.S. 250, 252 (1897), and cannot apply to bribes paid in England and Switzerland. The only state act involved was the actual sale of the concession, a commercial act the legitimacy and validity of which is not questioned by plaintiffs.

Nor does the present case involve a "potential" detriment to United States foreign policy. A branch of the United States government has already caused to be published details of the bribe, including the identity of the recipient, the oil minister of Umm Al Qaywayn. If any damage would have been caused by such an accusation, it would have resulted

from the government's announcement of the improper payment and not from a private litigant's suit against Occidental.

Proof that a governmental official, acting personally for his own benefit and not for the government, accepted a bribe cannot interfere with United States foreign relations, and while the acceptance of the bribe does not speak highly of the Umm Al Qaywayn oil minister, the necessity for raising such an issue in litigation before a United States court is not a basis for invoking the act of state doctrine.

The Ninth Circuit's holding that the act of state doctrine precludes judicial scrutiny of the Occidental Defendants' anticompetitive conspiracy simply because the goals of the conspiracy were furthered by the intentional corruption of a foreign government official plainly conflicts with the prior decisions of

this Court defining that doctrine.

III. THE NINTH CIRCUIT'S DECISION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. Whether the Foreign Corrupt Practices Act of 1977 Removes the Act of State Doctrine as a Defense in Actions Arising from Corrupt Foreign Payments

This Court established in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), that the theory of the act of state doctrine is the need of the judicial branch to abstain from making decisions in the area of foreign relations if such decisions would hinder or embarrass United States foreign policy. The logical corollary of the Sabbatino theory is that the doctrine does not apply when other branches of government have made the relevant foreign policy decision and announced it in such a way as to guide the courts.

Congress enacted the Foreign Corrupt Practices Act of 1977 ("FCPA") to stem corporate bribery of foreign governments and government officials for the purpose of obtaining or retaining business. See generally Siegel, The Implication Doctrine and the Foreign Corrupt Practices Act, 79 Colum. L. Rev. 1085 (1979); 15 U.S.C. § 78dd-2. See also id. §§78dd-1 & 78ff.

The legislative history of the FCPA shows Congress' intent to prohibit and eradicate bribery, not in spite of foreign policy problems, but in order to effectuate foreign policy objectives. In the years preceding enactment, bribery by U.S. businesses had become rampant. The House Committee report stated that this practice "creates severe foreign policy problems for the United States." H.R. Rep. No. 640, 95th Cong., 1st Sess. 5 (1977). It causes embarrassment to

friendly governments and the decline of esteem for the United States around the world. Id. In the Senate report accompanying the FCPA's immediate predecessor bill, the same "severe foreign policy problems" are set forth as the basis for the statute. S. Rep. No. 1031, 94th Cong., 2d Sess. 3 (1976).

The Ninth Circuit below need not have speculated that a proper hearing of Clayco's claims would encumber foreign policy. It is our foreign policy to prosecute bribery, whether under the FCPA or under the antitrust laws. The foreign relations repercussions of bribery actions were painstakingly considered by all the participants in the decision-making process that led to the FCPA; when Congress adopted and the President signed the toughest anti-bribery bill that had been considered, they held such repercussions to be no obstacle whatever.

The spirit of the Ninth Circuit's decision is most evident in its observation, at footnote 4 of its opinion, that "It may be that the revelation of bribery, more than bribery itself, causes these [foreign policy] problems." This descredited apology was considered and rejected by Congress and the President. Underlying the FCPA is the implicit conclusion that no government would object to an open and vigorous inquiry into corrupt practices. United States policy with respect to bribes is founded on the understanding that all governments condemn them. Far from requiring judicial restraint in handling bribe cases, Congress understood that it would be an insult to a foreign government to suppose that it would wish to suppress incidents of bribery by its officials.

Responding to concerns that the FCPA would be seen as an interference in foreign relations, Representative Stephen Solarz responded as follows:

> What I am talking about is legislation which would make American citizens live up to statutes of the United States. For example, would our government in any way resent it if a foreign government passed legislation in its own country prohibiting their nationals from bribing American officials?

Multinationals Abroad Hearings, supra, at 27.

The inapplicability of the act of state doctrine where corruption is involved received judicial endorsement in Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680, 690 (S.D.N.Y. 1979), wherein the court stated that an "act of state may be scrutinized by the courts if it resulted from the corruption of governmental officials." As in the instant case, the corruption exception arose in Dominicus on a

motion to dismiss. The Dominicus court, however, refused to dismiss the action at such an early stage in the proceedings:

> The allegations here that government actions were procured through fraud and coercion . . . suffice to preclude application of the act of state doctrine even to the expropriation issue at this stage of the litigation.

Id. (footnote omitted, emphasis added); cf. Jimenez v. Aristeguieta, 311 F.2d 547, 558 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963) (act of state doctrine does not protect "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it"); Sage International, Ltd. v. Cadillac Gage Co., 534 F.Supp. 896, 910 n. 26 (E.D. Mich. 1981) ("in spirit and in practice, the [Foreign Corrupt Practices] Act supports the notion that act of state concerns are subjugated to interests in stemming foreign corrupt practices").

In private civil cases, courts have heard a variety of claims involving foreign bribery. See, e.g., Habib v. Raytheon Co., 616 F.2d. 1204, 1206, 1211 (D.C. Cir. 1980) (appeals court suggestion that, on remand, trial court could find contract unenforceable if questionable payments to Prince Abdallah of Saudi royal family were illegal); Sedco International, S.A. v. Cory, 522 F.Supp. 254, 286-89 (S.D. Iowa 1980)(detailed examination of bribe to Qatar oil minister).

Because the activities contemplated by the FCPA necessarily involve the conduct of a foreign sovereign, application of the judicially created act of state doctrine to cases involving such corrupt payments has the effect of insulating the malfeasors from liability for the very conduct Congress has condemned. Such a result does not further United States foreign policy, but perversely

frustrates it.

The lower courts' assumption that they must avoid considering the grant of an oil concession because of the possibility that a government oil minister would be shown to have taken a bribe is entirely misplaced. Our government has stated its belief that respect for other nations compels us to deal firmly with bribery in our courts. Accordingly, the courts must presume that Umm Al Qaywayn abhors bribery and approves of the efforts of the United States to prevent it, and would only support efforts that would, as a side benefit, serve to protect its officials from bribes by foreign companies. The courts below plainly erred in assuming to the contrary.

B. Is the Grant of an Oil Concession So Uniquely Sovereign as to Foreclose Analysis of the Commercial Nature of the Act?

In Alfred Dunhill of London, Inc. v.

Republic of Cuba, 425 U.S. 682 (1976) four justices of this Court enunciated a rationale for removing commercial activity from the act of state doctrine. Observing that prior cases had established that a court should decline to adjudicate a case only where necessary to prevent embarrassment to the executive branch of the United States Government in its administration of foreign policy, id. at 697 (citing Banco Nacional de Cuba v. Sabbatino, supra, 376 U.S. at 427-28), the plurality noted that the Court had not granted sovereign immunity to foreign governments in suits arising out of their commercial dealings since the United States Department of State formally adopted that position. Id. at 702-03; see Letter from Jack B. Tate, Acting Legal Adviser, United States Department of State, to the United States Attorney General (May 19, 1952) (the "Tate let-

ter"), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 app. 2 (1976).

The commercial exception to the sovereign immunity doctrine was codified when Congress enacted it as part of the Foreign Sovereign Immunity Act of 1976 ("FSIA") 28 U.S.C. §1605(a)(2); see also id. §1602. In determining whether a "commercial activity" has taken place for FSIA purposes, courts are directed to make "reference to the nature of the course of conduct or particular transaction or act, rather than . . . to its purpose." Id. §1603(d).

In Dunhill, the court extended this reasoning to the act of state doctrine, stating:

> For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign

> is no more effective if given the label "Act of State" than if it is given the label "sovereign immunity."

Id. at 705.

The Ninth Circuit relied on certain expository language in Dunhill effectively to foreclose any reasoned analysis of the purposes of the act of state doctrine in a commercial context. Thus, the Dunhill plurality observed that

> In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens.

Id. at 704.

The Ninth Circuit, therefore, found that a private citizen could not grant a concession to exploit natural resources,* and so held that no further inquiry was

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* Although the Ninth Circuit's sweep is too broad, in that private property owners are entirely capable of granting mineral licenses, we may assume for present purposes that only a sovereign may grant an offshore oil concession.

necessary or permissible.

The plain thrust of the Dunhill opinion is that the act of state doctrine arises only in "exercises of governmental powers, including military powers and expropriations..." (id. at 404; emphasis in original); and that the "restrictive approach to sovereign immunity" (id.) should translate into a correspondingly expansive willingness to examine foreign acts of state which arise in a commercial context.

In this case, petitioners have not made any claim that Umm Al Qaywayn nationalized any assets or that it took any other governmental action that would justify automatic application of the act of state doctrine. Umm Al Qaywayn simply acted to exploit its property's commercial potential by granting Occidental U.A.Q. a right to explore for, extract and sell oil that

otherwise would have been granted to petitioners. If respondents resold their drilling concession, such sale would not constitute a governmental act. Similarly, if Umm Al Qaywayn had simply produced and sold its own oil on the market, its actions would be subject to a commercial, not a sovereign, standard. FSIA §1605(a)(2). There is no indication in this case that the Sheikdom of Umm Al Qaywayn granted the oil concession to Occidental rather than Clayco as "a considered policy decision by a government to give effect to its political and public interests...." See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (3d Cir. 1979).

Petitioners here do not allege that defendants secured the exercise of any public, governmental power. By finding that the presence of any uniquely sovereign component in a non-public commercial

activity of a sovereign renders the act of state defense absolute, the Ninth Circuit has turned the Dunhill decision on its head. Plainly, there is a need for this court to provide further guidance in the area of sovereign immunity, act of state, and developments in this area of international law since Dunhill.

Dated: September 30, 1983

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAYCO PETROLEUM CORPORATION and BRUCE CLAYMAN,

Plaintiffs-Appellants,

v.

OCCIDENTAL PETROLEUM CORPORATION, OCCIDENTAL OF UMM AL QAYWAYN, INC., and ARMAND HAMMER.

Defendants-Appellees.

No. 80-5657

D.C. #CV 79-3845-RMT

Appeal from the United States District Court for the Central District of California
Robert M. Takasugi, District Judge, Presiding
Argued December 8, 1981
Submitted March 23, 1982

Filed August 2, 1983

Before: KENNEDY* and SCHROEDER, Circuit Judges, and THOMPSON,** District Judge.

OPINION

PER CURIAM.

This appeal arises from an anti-trust suit filed by Clayco Petroleum Corporation and Bruce Clayman, the founder and principal shareholder of Clayco against Occidental Petroleum Corporation, Occidental of Umm Al Qay-wayn, Inc. and Armand Hammer (Occidental) charging Occidental with making secret payments to an official of Umm Al Qaywayn in order to obtain unlawfully an off-shore oil concession. The district court

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* Judge Kennedy was substituted to replace Judge Reinhardt on this panel as of January 17, 1983.

** Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

dismissed the action on the basis of the act of state doctrine.[1] We affirm.

I. FACTS AND PROCEDURAL CONTEXT

Plaintiffs commenced this action alleging violations of section 1 of the Sherman Act, 15 U.S.C. §1, section 2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c), sections 16720 and 17045 of the California Business and Professions Code, and the common law. The crux of the complaint is that Occidental conspired to make and made secret payments in England and Switzerland totalling $417,000 to Sheikh Sultan bin Ahmed Muallah (Sultan), Umm Al Qaywayn's Petroleum Minister and son of its ruler, Sheikh Ahmed al Mualla (Ahmed). The complaint further alleges that only through these unlawful and anti-competitive actions did defendants secure the

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[1] This court has held that the government of Umm Al Qaywayn is a foreign

valuable off-shore oil concession. More specifically, plaintiffs allege that in September 1969, Ahmed agreed that Clayco would receive the concession, but instead, on November 18, 1969, he awarded the concession to defendant Occidental of Umm Al Qaywayn, Inc., Occidental Petroleum's subsidiary.

Plaintiffs allege that the first information they obtained regarding why they lost the concession became available in December 1978. The December 11, 1978, edition of the Oakland Tribune contained a story which said that Occidental had distributed about $30 million under "questionable legal circumstances," and

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(footnote continued)

sovereign for purposes of the act of state doctrine. Occidental v. Buttes, 331 F. Supp. at 113. This determination was made when that nation was one of the Trucial States; the skeikdom is now part of the United Arab Emirates. This change does not warrant a redetermination of the sheikdom's status.

that Dr. Armand Hammer, Occidental's chief executive officer, had personally disbursed $217,000 to Sultan in a London hotel room in 1969. The article also reported that a second payment of $200,000 was made to Sultan in Switzerland. The article stated, "Hammer paid the initial $217,000 as part of a $1.7 million deal with the sheikdom . . . for an oil and gas concession."

In 1977, the Securities and Exchange Commission (SEC) commenced an action against Occidental alleging violations of the Securities Exchange Act of 1934 and rules promulgated thereunder, based on illegal or questionable payments made by Occidental. Securities and Exchange Commission v. Occidental Petroleum Corp., No. 77-0751, (D.D.C. filed May 3, 1977). Occidental consented to the entry of a permanent injunction and agreed to conduct an internal inves-

tigation of the alleged illegal payments and to prepare for the SEC and Occidental's stockholders a special report describing such payments. Report of the Special Committee of the Board of Directors of Occidental Petroleum Corporation, Investigated Payments and Accounting Practices of Occidental Petroleum Corporation (April 17, 1978) (the Payments Report).

The Payments Report was filed and revealed various illegal payments. A Source Memorandum annexed to the Payments Report further recites that Occidental's $200,000 payment in Switzerland was of "uncertain legality" and was inaccurately described and documented on Occidental's books.

Plaintiffs allege that these $417,000 in payments plus "entertainment" expenses constituted bribes to induce Sultan and his father to award the

concession to Occidental. Plaintiffs contend that Occidental, its subsidiary, and Dr. Hammer conspired to prevent competition and to deprive plaintiffs of the concession.

For the purpose of reviewing the district court's dismissal for failure to state a claim, we must assume that the facts alleged in the complaint are true. Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272, 275 n.7 (9th Cir. 1982); Austad v. United States, 386 F.2d 147, 149 (9th Cir. 1967). We recognize that dismissals for failure to state a claim are disfavored in antitrust actions. Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 1853 (1976). We assume, without deciding, that plaintiffs' allegations amount to antitrust violations. We must determine whether dismissal is nevertheless

required because the act of state doctrine bars this action. See Timberlane Lumber Co. v. Bank of America, N.T. & S.A. 549 F.2d 597, 608 (9th Cir. 1976).

The district court granted defendants' motion to dismiss, based on the act of state doctrine. The court stated that an exercise of sovereignty -- the award of the offshore oil concession -- was implicated in the case, and that adjudication would interfere with United States foreign policy. The court noted that plaintiffs' obligation to prove that they were damaged by defendants' conduct would necessitate review of the ethical validity of the sovereign's conduct. The court also refused to apply a commercial exception to the act of state doctrine.

II. ISSUES

The appellants raise numerous challenges to the district court's application of the act of state doctrine. In essence, appellants argue first that this case is outside the purview of the act of state doctrine; and second, that the foreign sovereign action involved fits within "corruption" or "commercial" exceptions to the doctrine.

III. DISCUSSION

The act of state doctrine was first enunciated in Underhill v. Hernandez, 168 U.S. 250, 252, 18 S. Ct. 83, 84 (1897): "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." The doctrine is a function of

our system of separation of powers and as such has "'constitutional' underpinnings." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 84 S. Ct. 923, 938 (1964). It recognizes that judicial examination of the acts of foreign governments may hinder the executive and legislative branches' conduct of foreign policy. Id.; Timberlane, 549 F. 2d at 605-06. Sabbatino prescribed a flexible approach to the doctrine; the critical element is the potential for interference with our foreign relations. "[T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428, 84 S. Ct. at 940.

With this in mind, we address appellants' claim that the complained of actions in this case do not include a sovereign policy decision. We cannot

agree. We acknowledge that without sovereign activity effectuating "public" rather than private interests, the act of state doctrine does not apply. International Association of Machinists and Aerospace Workers (IAM) v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); Timberlane, 549 F.2d at 607-08. That test is met here. This case differs from those relied upon by appellants, in which sovereign activity merely formed the background to the dispute or in which the only governmental actions were the neutral application of the laws.

For example, in Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), the court held that the granting of patents by a foreign sovereign did not constitute "a considered policy decision by a government to give effect to its political and public

interests . . .," 595 F.2d at 1294, and so was "not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs." Id. Similarly, in Timberlane, the only action by the Honduran government was to enforce existing laws in a private lawsuit, reflecting no sovereign decision to disfavor the losing party. Thus the defendants, whose alleged conspiracy encompassed initiating judicial action, could not raise an act of state defense. 549 F.2d at 608. See also Industrial Investment Development Corp. v. Mitsui & Co., 549 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980) (background of Indonesian law requiring local partners for foreign lumber business does not entitle private party who allegedly frustrated joint venture to raise act of state defense).

In contrast, the act of state docrine was held to bar antitrust claims in Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972).[2] Plaintiffs there alleged that the sovereign issued a fraudulent territorial decree to enable defendants, in the place of plaintiffs, to exploit oil and gas in the area covered by the decree. 331 F. Supp. at 101. Although Buttes involved a territorial decree,

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[2] In Buttes, Occidental was the plaintiff and Clayco was a defendant. The case against Clayco was dismissed on jurisdictional grounds. Defendants in that case were alleged to have induced the Ruler of Sharjah, a shiekdom adjacent to Umm Al Qaywayn, to assert fraudulently a territorial claim over offshore waters which included the very concession at issue here and so to deprive Occidental of its concession from Umm Al Qaywayn.

which is not present here, the underlying dispute in both cases concerns a sovereign decision authorizing exploitation of important national resources. Buttes is sufficiently analogous to call for act of state preclusion. Further, it is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy. IAM v. OPEC, 649 F.2d at 1360-61; Hunt v. Mobil Oil Corp., 550 F.2d 68, 78 (2d Cir. 1977), cert. denied 434 U.S. 984 (1978). This conclusion is unaffected by the fact that the ruler was not named as a party. Buttes, 331 F. Supp. at 110-11.

Appellants also argue that the examination of foreign governmental action which this case requires is not intrusive enough to warrant an act of state defense because the concern here

is the motivation behind the sovereign's act, rather than its legal validity. Appellants rely principally on the Fifth Circuit's statement that motivation and validity are not "equally protected by the act of state doctrine." Industrial Investment Development Corp. v. Mitsui, 594 F.2d at 55. That opinion does not foreclose application of the act of state doctrine to cases where motivation but not validity must be scrutinized. Rather, Mitsui holds that where the motivation for the sovereign act would be subject to a limited examination in order to measure the plaintiff's damages, and the adjudication "would result in no embarrassment to executive department action," inquiry is not foreclosed by the act of state doctrine. Id; cited with approval in Northrup Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1048 (9th Cir. 1983). In this

case, however, the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery, thus embarrassment would result from adjudication.

This circuit's decisions have similarly limited inquiry which would "impugn or question the nobility of a foreign nation's motivation." Timberlane, 549 F.2d at 607. In Buttes, the trial court, in an opinion adopted by this court, held judicial scrutiny of the motivation for foreign sovereign acts to be precluded by the act of state doctrine, noting that it has traditionally barred antitrust claims based on the defendant's alleged inducement of foreign sovereign action. 333 F. Supp. at 110 (citing American Banana Co. v. United Fruit, 213 U.S. 347 (1909)). We recently reaffirmed our unwillingness to "resolve issues requiring 'inquiries . . . into

the authenticity and motivation of the acts of foreign sovereigns.'" Northrup, 705 F.2d at 1047 (quoting Buttes at 110). Appellants thus cannot argue that inquiry into motivation in this case is unprotected.

We turn now to appellants' efforts to invoke exceptions to the act of state doctrine. Appellants first contend that an exception for purely commercial acts should apply in this case. A plurality of the Supreme Court recognized an exception for purely commercial activity in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 96 S. Ct. 1854 (1976), but only four Justices concurred in that section of the opinion. The Dunhill plurality emphasized that a commercial exception is appropriate in situations where governments are not exercising powers peculiar to sovereigns. 425 U.S. at 704, 96 S. Ct. at

1866. Unlike the context Dunhill envisioned, the governmental action here could not have been taken by private citizen. Granting a concession to exploit natural resources entails an exercise of powers peculiar to a sovereign. See United States v. California, 332 U.S. 19, 29, 67 S. Ct. 1658, 1664 (1947); see generally IAM v. OPEC, 477 F. Supp. 553, 567, (C.D. Cal. 1979) (international law shows control over natural resources is exercise of sovereignty).

The Ninth Circuit has not definitively ruled on the commercial exception. Compare Northrup, 705 F.2d 1048 n.25 (alluding to existence of commercial exception), with IAM v. OPEC, 649 F.2d at 1360 (holding that presence of a "commercial component" does not create an exception). Because the rule espoused by the Dunhill plurality would not apply in any

event, we need not reach the question whether to adopt an exception to the act of state doctrine for purely commercial activity.

Appellants also contend that the passage of the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-1 et seq. (Supp. V 1981), created an exception to the act of state doctrine which should apply in this case.[3]

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[3] Neither the Supreme Court nor a court of appeals has spoken on this issue. The district court in Dominicus Americana Bohio v. Gulf & Western, 473 F. Supp. 680, 690 (S.D. N.Y. 1978), held, at least in the alternative, that there is a "corruption exception" to the act of state doctrine. No truly supportive authority, however, is cited by the court for that proposition. The district court in Sage International, Ltd. v. Cadillac Gage Co., 534 F. Supp. 894 F. Supp. 896 (E.D. Mich. 1981), said in dictum that "there is a likelihood that the doctrine could be avoided were the allegations such as to call for review of foreign sovereign corruption charges." Id. at 910. The court also said in dictum that "in spirit and practice, the Act [FCPA] supports the notion that act of state concerns are subjugated to in-

The FCPA prohibits bribery of a foreign official for the purpose of obtaining or retaining business. 15 U.S.C. §§ 78dd-1, dd-2. The Act provides for severe criminal penalties including fines and imprisonment. 15 U.S.C. §§ 78dd-2(b), 78ff. In addition, the Attorney General may bring a civil action to enjoin impending violations. 15 U.S.C. § 78dd-2(c).

The FCPA was intended to stop bribery of foreign officials and political parties by domestic corporations. Bribery abroad was considered a "severe" United States foreign policy problem; it embarrasses friendly governments, causes a decline of foreign esteem for the United States and casts suspicion

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(footnote continued)

terests in stemming foreign corrupt practices." Id. n 26.

on the activities of our enterprises, giving credence to our foreign opponents. H.R. Rep. No. 640, 95th Cong., 1st Session. 5 (1977).[4] The FCPA thus represents a legislative judgment that our foreign relations will be bettered by a strict anti-bribery statute. There is also no question, however, that any prosecution under the Act entails risks to our relations with the foreign governments involved. Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum. L. Rev. 1247, 1261 (1977); Department of State Responses to October 5, 1981 Inquiry by Congressman Timothy E. Wirth, Chairman U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection, and

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[4] It may be that the revelation of bribery, more than bribery itself, causes these problems. H.R. Rep. No. 640, 95th Cong. 1st Sess. 5 (1977).

Finance of the Committee on Energy and Commerce at 10-11, 13, 18, 20.

The Justice Department and the SEC share enforcement responsibilities under the FCPA.[5] They coordinate enforcement of the Act with the State Department, recognizing the potential foreign policy problems of these actions. See Testimony of Ernest B. Johnston, Jr., Department of State Before the Subcommittee on Telecommunications, Consumer Protection and Finance, House Committee on Energy and Commerce, December 16, 1981 at 11; Department of State Responses to October 5, 1981 Inquiry,

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[5] For example, in United States v Carver, No. 79-1768 (S.D. Fla., filed May 1, 1979), the Justice Department took action against a bribe in circumstances similar to the ones alleged here involving the Emirate of Qatar. An example of SEC enforcement is SEC v Page Airways, Inc., No. 78-0656 (D.D.C. filed April 12, 1978), reprinted in Fed. Sec. L. Rep. (CCH)¶ 96, 393 (1978).

Supra, at 12, 13. Executive bodies have discretion in bringing any action. E.g. United States v. Cox, 342 F.2d 167, 193 (5th Cir.)(Wisdom, J., concurring), cert. denied, 381 U.S. 935 (1965).[6] Therefore, any governmental enforcement represents a judgment on the wisdom of bringing a proceeding, in light of the exigencies of foreign affairs. Act of state concerns are thus inapplicable since the purpose of the doctrine is to prevent the judiciary from interfering with the political branch's conduct

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[6] Appellants argue that the matter of prosecutorial discretion is academic in this case, because the SEC action and resulting Payments Report and Source Memorandum have already publicized the events at issue here. However, the Payments Report and Source Memorandum disclose only some of the underlying facts and only raise a question as to the legality of some of the payments under Umm Al Qaywayn law. There was no inquiry into the reasons for the granting of the concession.

of foreign policy. Sabbatino, 476 U.S. at 423, Timberlane, 549 F.2d at 605.

Here, however, we are faced with a private lawsuit, rather than a public enforcement action. It is the screening of governmental proceedings, with State Department consultation, which distinguishes FCPA enforcement from private suits. See Timberlane, 549 F.2d at 613. Hence, in private suits, the act of state doctrine remains necessary to protect the proper conduct of national foreign policy. We therefore reject appellants' contention, which is not supported by the legislative history, that in enacting the FCPA, Congress intended to abrogate the act of state doctrine in private suits based on foreign payments.

For the reasons above, we hold that the act of state doctrine applies,

and that appellants do not come within any exception to the doctrine. The decision of the trial court dismissing the action is therefore AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV-79-3845 -RMT

Date: September 19, 1983

Title: Clayco Petro. Corp et al -v-
Occidental Petro Corp et al

DOCKET ENTRY

ENTERED

Sept 22, 1983
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PRESENT:

HON. ROBERT M. TAKASUGI, JUDGE
Tamara Saunders
Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
none

ATTORNEYS PRESENT FOR DEFENDANTS:
none

PROCEEDINGS:

IT IS ORDERED that the mandate from the USCCA, 9th Circ., affirming this District Court (Appl §80-5657), is hereby filed and spread. The Notice setting hearing on filing and spreading for 10/3/83 is vacated. IT IS FURTHER ORDERED that the order awarding costs to appellee in amount of $5,104.00 is also filed & spread.

s/
Initials of Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT M. TAKASUGI, JUDGE PRESIDING

- - -

CLAYCO PETROLEUM CORPORATION and BRUCE CLAYMAN,

Plaintiffs,

vs.

OCCIDENTAL PETROLEUM CORPORATION OCCIDENTAL OF UMM AT QUWAIN, INC., and ARMAND HAMMER,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PLACE: Los Angeles, California

DATE: Monday, July 21, 1980

DONNA FITZSIMONS, CSR §2387
Official Reporter
430 United States Courthouse
312 North Spring Street
Los Anglges, California 90012
(213) 622-5391

THE COURT: Thank you very much.

As far as the facts of this particular case are concerned, it does implicate the sheikdom in a bribery scandal, which naturally colors the exercise of their sovereignty in awarding oil concessions and it does interfere with U.S. foreign policy.

With respect to the commercial exception, it certainly is not adopted by the Ninth Circuit. And even if it were, it would not be applicable here.

I think the need to prove the but-for causation would lead the Court to pass on the ethical validity of the sovereign's act, which obviously is precluded by the Act of State doctrine. On that basis, the motion to dismiss is granted.

On the American Lighting Specialities, Inc., matter, apparently Counsel was --

MR. WESTBROOK: Does your Honor wish a formal order?

THE COURT: Please.

(Proceedings concluded.)

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CLAYCO PETROLEUM CORPORATION
and BRUCE CLAYMAN,

Plaintiffs,

vs.

OCCIDENTAL PETROLEUM CORPORATION
OCCIDENTAL OF UMM al QUWAIN, INC.
and ARMAND HAMMER,

Defendants.

NO. 79 03845 RMT (Kx)

ORDER DISMISSING ACTION

WHEREAS, defendants have made a motion to dismiss this action upon the ground, inter alia, of the act of state doctrine, and

WHEREAS, defendants and plaintiffs have filed extensive memoranda in support of and in opposition to said motion and the open court on July 21, 1980, and

WHEREAS, the Court has decided that the act of state doctrine precludes adjudication of the claims set forth in the complaint and, therefore, it is unnecessary to decide the other grounds advanced in support of the motion,

NOW, THEREFORE, IT IS ORDERED that this action be and it hereby is dismissed for failure to state a claim upon which relief can be granted.

DATED: July 25, 1980

/s/
U.S. District Judge

APPENDIX E

Statutes Involved

The Sherman Act

Trusts, etc., 15 U.S.C. §1 in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Clayton Act

as amended by the

Robinson-Patman Act

15 U.S.C. §13(c)

Discrimination in price, services, or facilities--Price; selection of customers Payment or Acceptance of Commission, Brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such

transaction other than the person by whom such compensation is so granted or paid.

The Foreign Sovereign Immunities Act

28 U.S.C.

Judiciary -- Procedure

§1602 Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their

commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§1603 Definitions

For purposes of this chapter-

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political sub-

division thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact

with the United States.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of

the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taxes in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable

property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to-

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of pro-

cess, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That-

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the

party bringing the suit-unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provded in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to

be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: Provided, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

The Foreign Corrupt Practices Act of 1977

15 U.S.C.

Commerce and Trade

§78dd-1. Foreign corrupt practices by issuers--Prohibited practices

(a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee,

or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the giving of anything of value to-

(1) any foreign official for purposes of -

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in

obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of-

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use is or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or

with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of-

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its

influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

Penalties

(b)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) of this section shall, upon coviction, be fined not more than $1,000,000.

(B) Any individual who is a domestic concern and who willfully violates subsection (a) of this section shall, upon conviction, be fined not more than $10,000. or imprisoned not more than five years, or both.

(2) Any officer or director of a domestic concern, who willfully violates subsection (a) of this section shall, upon conviction, be fined not more than $10,000 or imprisoned not more than five years, or both.

(3) Whenever a domestic concern is found to have violated subsection (a) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection

upon any officer, director, stockholder, employee, or agent of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

Civil Action by Attorney General to Prevent Violations

(c) Whenever it appears to the Attorney General that any domestic concern, or officer, director, employee, agent, or stockholder thereof, is engaged, or is about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing a permanent or temporary injunction or a temporary restraining order shall be granted without bond.

Definitions

(d) As used in this section:

(1) The term "domestic concern" means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on

behalf of any such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

(3) The term "interstate commerce" means trade, commerce, transportation or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. Such term includes the intrastate use of (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

§78dd-2. Foreign corrupt practices by domestic concerns - Prohibited practices

(a) It shall be unlawful for any domestic

concern, other than an issuer which is subject to section 78dd-1 of this title, or any officer, director, employee, or agent of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to-

(1) any foreign official for purposes of-

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or in-

strumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of-

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or

instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foregn political party or official thereof, or to any candidate for foreign political office for purposes of-

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use its or his in-

fluence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instruentality. in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

Definition

(b) As used in this section, the term "foreign official" means any officer or employee of a foreign government or any person acting in an official capacity for or on behalf of such government or department agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

78ff. Penalties

(a) Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 780 of this title or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was

false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 780 of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to to file shall continue. Such

forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States. (c)(1) Any issuer which violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $1,000,000. (2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder,

employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.

No. 83-546

IN THE

Supreme Court of the United States

October Term, 1983

CLAYCO PETROLEUM CORPORATION AND BRUCE CLAYMAN

Petitioners,

vs.

OCCIDENTAL PETROLEUM CORPORATION, OCCIDENTAL OF UMM AL QAYWAYN, INC. AND ARMAND HAMMER

Respondents.

On Petition For Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 2, 1983

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

QUESTIONS PRESENTED

1. Did the Ninth Circuit render a decision in conflict with applicable decisions of this Court by holding that the Act of State doctrine precludes adjudication of whether the Ruler of Umm al Qaywayn awarded a concession for exploitation of that sheikdom's oil resources as a consequence of bribes delivered to his oil minister?

2. Did the Ninth Circuit render a decision in conflict with a decision of the Fifth Circuit by holding that the Act of State doctrine precludes adjudication of whether the Ruler of Umm al Qaywayn awarded a concession for exploitation of that sheikdom's oil resources as a consequence of bribes delivered to his oil minister?

3. Does the Ninth Circuit's conclusion that the Foreign Corrupt Practices Act does not create an exception to the Act of State doctrine in private actions imperiling the conduct of this country's foreign policy present an important question of federal law that should be settled by this Court?

4. Does the Ninth Circuit's conclusion that the granting of an oil concession by the Ruler of Umm al Qaywayn was a sovereign act rather than a commercial transaction present an important question of federal law that should be settled by this Court?

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COUNTERSTATEMENT OF THE CASE

Because the trial court dismissed this case for failure to state a claim upon which relief can be granted, on review the averments of the complaint must be accepted as true. Petitioners' summary of those averments (Petition at 3-4) fails to mention that the actions of the Ruler of Umm al Qaywayn, Sheikh Ahmed al Mualla ("Sheikh Ahmed"), and not merely those of his son Sheikh Sultan, the oil minister, are necessarily questioned by the complaint. The complaint, Appendix F

hereto,* avers that petitioners negotiated directly with the Ruler for the oil concession (App. F ¶ 11); that the Ruler promised petitioners the concession (App. F ¶ 12); that the Ruler later granted the concession instead to respondents (App. F ¶ 13); and that the purpose and effect of the alleged payments were to induce the oil minister *and* the Ruler to give the concession to respondents (App. F ¶ 14).**

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION APPLYING THE ACT OF STATE DOCTRINE IN THIS CASE IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Act of State doctrine prevents a court of this country from questioning the official actions of a foreign sovereign. *Underhill v. Hernandez*, 168 U.S. 250 (1897). Its purpose is to avoid the courts' entertaining cases which would "imperil

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* The appendices hereto are designated Appendix F and G to continue the format begun in the Petition.

** Rule 28.1 Listing.

Occidental Petroleum Corporation has the following subsidiaries (except wholly owned subsidiaries) and affiliates: Beatrice Pocahontas Company; C-D Development Corporation; Canadian Occidental Petroleum Ltd.; Cansulex Limited; Citco Union Texas Petroleo Do Brasil Ltda.; Clam Petroleum Company; Cold Springs Pipeline Company; Coltexo Corporation; Cynthia Gas Gathering Company Limited; Direccion Oxy, S.A. de C.V.; Dixie Pipeline Company; East Texas Salt Water Disposal Company; Eko Hotels Limited; Enoxy Coal, Inc.; Hispano Inversion, S.A.; Hooker Denkai Co., Ltd.; Industria Quinica De Portuguesa, S.A.; International Ore & Fertilizer Begium, S.A.; Key Pipe Line Co., Ltd.; Malharia Industrial Do Nordeste S.A.; Mississippi Chemical Corporation; Northward Developments Ltd.; Numinter Limited; Nunival S.A.; Oxy Metal Industries (France) S.A.; Petrogas Processing Ltd.; Petway Products Distributors, Inc.; Plasticos & Derivados Compania Anonima; Plastiflex, C.A.; Quimica Hooker S.A.; Rail to Water Transfer Corporation; Rose Creek Vangorda Mines Limited; Starbar de Mexico S.A. de C.V.; Sultran Limited; Sumdum Development Corporation; Sumitomo Durez Co., Ltd.; Symcrude Canada Ltd.; The Southland Corporation; Tororo Industrial Chemicals and Fertilizers Limited; and Trans-Jeff Chemical Corporation.

Occidental of Umm al Qaywayn, Inc.'s parent company is Occidental Exploration and Production Company.

the amicable relations between governments and vex the peace of nations." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918). The Act of State doctrine "requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918). The doctrine rests "upon the highest considerations of international comity and expediency." *Oetjen v. Central Leather Co.*, supra, 246 U.S. at 303-04.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), is the most comprehensive modern restatement of the Act of State doctrine. This Court concluded that the doctrine has constitutional underpinnings and is based on the separation of powers, which places primary responsibility for conducting foreign affairs in the executive branch. Since *Sabbatino*, the most important factor in determining whether the Act of State doctrine requires dismissal of a case is the likelihood that its adjudication would interfere with this country's foreign relations. This test has guided every significant decision applying the Act of State doctrine since *Sabbatino*. The Ninth Circuit below, relying on *Sabbatino*, likewise reasoned that "the critical element [in determining whether a case must be dismissed under the Act of State doctrine] is the potential for interference with our foreign relations." 712 F.2d at 406; App. A at 10.

Applying this test, the Ninth Circuit analyzed petitioners' complaint to determine its potential for interference with this country's foreign relations. It properly identified the governmental act underlying petitioners' complaint as the Ruler's award to defendants of an oil concession in Umm al Qaywayn,[1] and found that petitioners' claim required scrutiny of that "sovereign decision authorizing

[1] Petitioners' brief creates confusion by seeming to suggest that the only "act" necessarily scrutinized by their case is the Petroleum Minister's allegedly accepting bribes in Europe. Petition at 17-18. Later in the same paragraph, however, petitioners acknowledge that the state act involved in the case is the Ruler's award to

exploitation of important national resources." 712 F.2d at 407; App. A at 14.[2] Petitioners have conceded as much; in their brief on appeal, petitioners advised the Ninth Circuit that "admittedly, to establish their damages, plaintiffs must demonstrate that but for defendants' anticompetitive conduct, Umm al Qaywayn would have awarded the controversial concession to plaintiffs." Appellants' Opening Brief at 27. The Ninth Circuit therefore correctly concluded that petitioners' complaint required finding that the sovereign's conduct was induced by bribery (712 F.2d at 407; App. A at 16), a conclusion which petitioners have not disputed.

Both the district court and the Ninth Circuit found that these aspects of petitioners' case demonstrated its potential for interference with this country's foreign relations. The Ninth Circuit cited *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), each of which held that the Act of State doctrine required dismissal of a case questioning the acts of Middle Eastern and other OPEC governments regarding their oil resources. The court held that a case which

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respondents of the concession in Umm al Qaywayn. Petitioners are correct the second time: it is not the alleged acceptance of bribes in England and Switzerland, but rather the Ruler's award of the concession that is the Act of State at issue here. Unquestionably, the grant of the Umm al Qaywayn oil concession was a governmental act "done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

[2] At one point in their brief petitioners seem to dispute that Umm al Qaywayn is the type of foreign entity to which the Act of State doctrine applies. *See* Petition at 17. However, petitioners offer no authority to contradict the Ninth Circuit's holding in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), relied on in this case, that it is such an entity. *See* 712 F.2d at 405, n. 1; App. A at 4-5. *See also Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

necessarily questioned a foreign sovereign's decision in this area called for Act of State preclusion, since:

> "[I]t is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy." 712 F.2d at 407; App. A at 14.

The court further held that petitioners' proposed proof of bribery would also interfere with foreign relations: "[T]he very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery, thus embarrassment would result from adjudication." 712 F.2d at 407; App. A at 16. The Ninth Circuit's analysis of the Act of State issues thus followed this Court's guidance in *Sabbatino* to analyze carefully foreign relations impacts.

Petitioners' argument that the Ninth Circuit's decision herein conflicts with decisions of this Court relies primarily on *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Petition at 14-16. But that case, which predates *Sabbatino* in any event, is not an Act of State case: it contains no mention whatever of the Act of State doctrine. The Court's discussion quoted by petitioners (Petition at 15) related solely to the question whether defendants' conduct was shielded from the federal antitrust laws by *Parker v. Brown*, 317 U.S. 341 (1943) on the grounds that it was required by governmental regulations. Moreover, *Continental Ore* is distinguishable on its facts. This Court found that the anticompetitive acts alleged in that case had been committed entirely by a private party exercising discretionary powers granted it by the Canadian government, and that there was "no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of [the anticompetitive acts]." 370 U.S. at 706. For this reason the Second Circuit has characterized *Continental Ore* as a case in which "no act of the sovereign was involved." *Hunt v. Mobil Oil Corp., supra,* 550 F.2d at 75. *Continental Ore* cannot be likened to the case at bar, in which a foreign

sovereign Ruler's own decision and the motives behind it are directly questioned.

Petitioners raise a number of other arguments to contest the holdings below that this case must be dismissed under the Act of State doctrine. None is persuasive.

First, petitioners claim that *Sabbatino* limits application of the doctrine to cases where the "validity" of the foreign sovereign's act is challenged. Petition at 16-17. But in *Sabbatino*, where the validity of an expropriation *was* challenged, this Court expressly declined "laying down or reaffirming an inflexible and all-encompassing rule" defining the circumstances in which the doctrine would apply. 376 U.S. at 428. The Court's references to "validity" do not purport to state a limitation on the circumstances in which the doctrine must be applied, and cannot fairly be construed as doing so. In fact, *Underhill v. Hernandez*, *supra*, this Court's landmark case in which the Act of State doctrine was first applied, was not an expropriation case and no challenge was made to the "validity" of the foreign sovereign's actions.

Second, petitioners argue that they do not assert any claim against Sultan or other Umm al Qaywayn officials and imply that this avoids the doctrine. Petition at 8, 15. However, there is no authority that petitioners' omission of Umm al Qaywayn or its officials as parties defendant renders the doctrine inapplicable. Many cases have been dismissed under the Act of State doctrine where neither the foreign governments whose acts were in issue nor any of their officials were named as defendants. *See, e.g., Oetjen v. Central Leather Co., supra; Ricaud v. American Metal Co., supra; American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Hunt v. Mobil Oil Corp., supra; General Aircraft Corp v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977); and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., supra.* As the court in *Occidental v. Buttes* put it: "[P]laintiffs necessarily ask this court to 'sit in judgment'

upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators." 331 F.Supp. at 110. *See also* Justice Marshall's dissenting opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976), calling the Act of State doctrine "[e]qually applicable whether a sovereign nation is a party or not . . . ." 425 U.S. at 726.

Third, petitioners argue that because the details of the alleged bribery have already been revealed publicly, no foreign relations impact will result from adjudication of their case. Petition at 18-19. This argument was made below and was properly rejected by the Ninth Circuit. The court reviewed and summarized the facts set forth in the newspaper article and in the Payments Report,[3] 712 F.2d at 405; App. A at 4-7, and concluded that they "disclose only some of the underlying facts and only raise a question as to the legality of some of the payments under Umm al Qaywayn law. *There was no inquiry into the reasons for the granting of the concession.*" 712 F.2d at 409, n. 6; App. A at 23 (emphasis added). Petitioners offer nothing which disputes this conclusion nor do they present any reason why this Court should review that factual determination.

[3] Although the "Payments Report" cited by petitioners (Petition at 5, 6) was not part of the record herein, respondents did not object to the Ninth Circuit's reviewing it, and therefore provided copies to the court at oral argument.

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THE FIFTH CIRCUIT'S DECISION IN THE *MITSUI* CASE.

Petitioners claim that the Ninth Circuit's decision in this case conflicts with a decision of the Fifth Circuit, *Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *reh. denied*, 599 F.2d 449 (1979), *cert. denied*, 445 U.S. 903 (1980). Petition at 9-13. Petitioners' claim of inconsistency is based on language in *Mitsui* to the effect that cases challenging the "validity" of a foreign sovereign's action are of greater Act of State concern than cases questioning the "motivation" behind such action. 594 F.2d at 55.

But whether validity and motivation are equally protected is beside the point. Inquiries into a sovereign's motivation *are* protected by the Act of State doctrine where such inquiries would embarrass foreign relations, and nothing in the *Mitsui* opinion holds otherwise. The Fifth Circuit did not hold that cases involving a sovereign's motivation necessarily avoided the Act of State doctrine, as petitioners suggest; *Mitsui* states only that such cases might avoid the doctrine *if* they raise no foreign relations concerns. In the very language quoted by petitioners, the *Mitsui* opinion reasoned that:

> "Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals *where adjudication would result in no embarrassment to executive department action.*" 594 F.2d at 55 (emphasis added).

Both the district court and the Ninth Circuit held below that the inquiry into foreign sovereign motives required by the case at bar *would* embarrass the executive branch's conduct of foreign affairs. Petitioners offer no reason why this Court should review that determination. The language from *Mitsui* cited by petitioners therefore *supports* dismissal of this case. Indeed, the Ninth Circuit considered and relied on the Fifth Circuit's *Mitsui* opinion

in dismissing petitioners' claims below. 712 F.2d at 407; App. A at 15-16.

Mitsui and the Ninth Circuit decision below are consistent. In *Mitsui*, the plaintiffs were an American company and related foreign entities which had sought to conduct logging operations in Indonesia. Because Indonesian government regulations required foreign companies to have a local partner, plaintiffs formed a joint venture with an Indonesian company. Defendants, to forestall plaintiffs' competition, allegedly sponsored a dissident shareholder group which seized control of plaintiffs' Indonesian partner and caused it to renounce the joint venture. Plaintiffs thereby lost their right to do business in Indonesia under its government regulations and sued under the antitrust laws.

Defendants in *Mitsui* sought dismissal under the Act of State doctrine, arguing that it was the Indonesian government's failure to allow plaintiffs to do business there that caused plaintiffs' harm. The Fifth Circuit Court of Appeals disagreed. It reasoned that the Indonesian government regulations were merely background for the wrongful acts alleged (the takeover of plaintiffs' partner). The Indonesian government's neutral application of its regulations, that sovereign's "only connection" with the case, 594 F.2d at 54, was not the type of sovereign policy decision requiring application of the Act of State doctrine: "[A] stage fortuitously set by existing foreign legislation cannot automatically be invoked to shield conspiracies to restrain United States trade." *Id* at 53. The Act of State doctrine therefore did not require dismissal of the case.

Indeed, the Fifth Circuit acknowledged in *Mitsui* that a case like the instant one would require application of the doctrine. The *Mitsui* opinion discussed *Hunt v. Mobil Oil Corp., supra*, in which plaintiff pleaded that seven oil companies had maneuvered it into a position which resulted in Libya's expropriating its oil concessions. The court quoted the Second Circuit's description of the foreign relations concerns raised by such a case: "The action taken

here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants." 594 F.2d at 55, n. 11. Referring to that quotation, the Fifth Circuit contrasted *Hunt*'s foreign policy implications with those in the case before it: "No such 'implications and complications' hinder a resolution of Industrial Investment's antitrust claims here." *Id.* The Fifth Circuit thus recognized that cases turning on a determination by the government of an oil producing country as to which private companies should be permitted to own oil concessions in their sovereign territory, as this case does, raise more serious foreign relations concerns than did the case before it.

Mitsui likewise distinguished the foreign relations concerns present in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., supra,* a case which involved the same oil concession as is in issue here. *Mitsui* explained that *Occidental*, unlike the case before it, was a case "where plaintiffs' asserted claim arose through rights granted by a foreign government. . . ." 594 F.2d at 54. It further distinguished *Occidental* as requiring an American court to set an "ethical standard . . . by which the propriety of [the government's] decision is tested," a matter which raised serious foreign relations concerns. *Id.* at 55. The allegations in the instant case are like those in *Occidental v. Buttes*, and unlike those in *Mitsui:* petitioners' alleged claims for relief arose through rights granted by a foreign government, and would require proof of bribery presenting ethical questions offensive to foreign governments and embarrassing to American foreign policy.

Petitioners further suggest, based on other language from *Mitsui*, that their case avoids the doctrine because only their damages require proof of the Ruler's reasons for awarding the concession to Occidental. Petition at 11. The plaintiffs in *Mitsui*, however, were in a different position than petitioners here. Plaintiffs in *Mitsui* claimed damages not only from the loss of the license from the Indonesian government, but *also* from certain of defendants' acts which directly caused them

losses apart from any involvement of the Indonesian government. The Act of State doctrine was completely irrelevant to the latter portion of their claim. Therefore, even if the Act of State doctrine had been applicable to bar part of plaintiffs' case in *Mitsui*, it would have affected only the *amount* of damage and would not have required dismissal of plaintiffs' entire case. As the court in *Mitsui* stated:

> "[I]nquiry beyond the fact of some damage flowing from the unlawful conspiracy relates only to the amount and not the fact of damage . . . Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine." 594 F.2d at 55.

The case at bar is entirely different from *Mitsui* from that perspective. Petitioners here can state no claim for relief unless they prove that the Ruler awarded the concession to Occidental as a consequence of the alleged bribes about which they complain. Petitioners have never claimed in this case that any acts of respondents directly caused them damage independent of that caused by the government of Umm al Qaywayn in denying them the concession. In the words of the *Mitsui* court, determining the motivation of the Ruler in the within case is necessary for establishing the fact of damage, not merely the amount.

The Ninth Circuit expressly recognized the differences between *Mitsui* and this case when discussing the *Mitsui* opinion:

> "Appellants also argue that the examination of foreign governmental action which this case requires is not intrusive enough to warrant an act of state defense because the concern here is the motivation behind the sovereign's act, rather than its legal validity. Appellants rely principally on the Fifth Circuit's statement that motivation and validity are not

"equally protected by the act of state doctrine." *Industrial Investment Development Corp. v. Mitsui*, 594 F.2d at 55. That opinion does not foreclose application of the act of state doctrine to cases where motivation but not validity must be scrutinized. Rather, *Mitsui* holds that where the motivation for the sovereign act would be subject to a limited examination in order to measure the plaintiff's damages, and the adjudication 'would result in no embarrassment to executive department action,' inquiry is not foreclosed by the act of state doctrine." 712 F.2d at 407; App.A at 14-15.

In short, the Ninth Circuit decision herein and the *Mitsui* case are consistent.

III. THE NINTH CIRCUIT'S CONCLUSION THAT THE FOREIGN CORRUPT PRACTICES ACT DOES NOT CREATE AN EXCEPTION TO THE ACT OF STATE DOCTRINE IN PRIVATE SUITS DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

Petitioners' argument that the Foreign Corrupt Practices Act, Pub. L. 95-213, 91 Stat. 1494 (Dec. 19, 1977), 15 U.S.C. §§ 78dd-1 et seq. ("FCPA"), somehow creates an exception to the Act of State doctrine in private lawsuits (Petition at 20-24) was likewise strenuously argued to the Ninth Circuit. The court's opinion reflects a thorough consideration of the legislative history of the FCPA.

The Ninth Circuit found that the FCPA "represents a legislative judgment that our foreign relations will be bettered by a strict anti-bribery statute." 712 F.2d at 408; App. A at 21. Petitioners conclude from that fact too easily, however, that Congress intended to abrogate the Act of State doctrine in private lawsuits alleging bribery of foreign officials. Petition at 22-23. The Ninth Circuit found that Congress was aware that "prosecution under the Act entails risks to our relations with the foreign governments involved . . .," 712 F.2d at 408; App. A at 21,

and so confined enforcement authority to the Justice Department and the SEC, which "coordinate enforcement of the Act with the State Department, recognizing the potential foreign policy problems of these actions." *Id.* at 409; App. A at 22.[4]

The Ninth Circuit therefore concluded that the FCPA and the Act of State doctrine were complementary, not inconsistent as petitioners argue. In an FCPA enforcement action brought by government prosecutors, the foreign policy ramifications of the proposed action have been considered and accommodated: "[A]ny governmental enforcement represents a judgment on the wisdom of bringing a proceeding, in light of the exigencies of foreign affairs. Act of State concerns are thus inapplicable. . . ." 712 F.2d at 409; App. A at 23. The court contrasted this situation with a private action raising bribery allegations. In a private action, the Act of State doctrine provides the sole assurance that the courts will avoid interfering in foreign policy matters: "It is the screening of governmental proceedings, with State Department consultation, which distinguishes FCPA enforcement from private suits. [citation omitted] Hence, in private suits, the act of state doctrine remains necessary to protect the proper conduct of national foreign policy." *Id.;* App. A at 24.

Petitioners overlook this crucial distinction in claiming license to pursue a private action, oblivious to its impact on foreign policy. *Sabbatino* taught that it is the political branches of our federal government, not the courts or private corporations, which are given the constitutional charter to conduct foreign policy. Just as the FCPA was intended to stop U.S. corporations from interfering with U.S. foreign relations through their business overseas, the Act of State doctrine likewise prevents private parties

[4] In addition to the legislative history, respondents submitted to the Ninth Circuit a letter from the Department of State describing its practice of consulting with the Justice Department and the SEC on the foreign relations issues involved in proposed FCPA enforcement actions. That letter, along with respondents' inquiry to the Department of State, are submitted herewith as Appendix G.

from interfering with foreign relations through the courts of this country.

Petitioners' arguments well demonstrate the danger of abrogating the doctrine. Admitting that the claim it seeks to try and have determined in the district court "does not speak highly of the Umm al Qaywayn oil minister," (Petition at 19) they nevertheless ask for the foreign policy implications of their action to be ignored; they argue that the courts "must presume that Umm al Qaywayn abhors bribery and approves of the efforts of the United States to prevent it, and would only support [such] efforts. . . ." Petition at 27. But regardless of the ethical concepts which prevail in the foreign country, a trial in absentia in an American court of the integrity of a sovereign ruler is bound to touch a raw nerve, especially when the court's findings will be based on evidence selected by private litigants for their own partisan purposes. *See International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, supra.* Petitioners, in urging the court to entertain their claim by adopting a presumption that the foreign government would approve, ignore the separation of powers principles underlying the Act of State doctrine and the need for judicial forbearance in matters affecting United States foreign relations.

The Ninth Circuit also properly rejected Petitioners' asserted "corruption exception" to the Act of State doctrine as lacking any truly supportive authority. 712 F.2d at 408; App. A at 19-20. Petitioners rely on *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 689-690 (S.D.N.Y. 1979), where the District Court referred cryptically to such an exception as an alternative holding on the purported authority of *Hunt v. Mobil Oil Corp., supra.* But in *Hunt*, the Second Circuit expressly declined to consider the question, stating that the case before it was "not the proper vehicle for consideration of international commercial bribery in so far as it affects the act of state doctrine." 550 F.2d at 79.

Petitioner's reliance on *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, *reh. denied*, 374 U.S. 858 (1963), a case predating *Sabbatino*, is similarly misplaced. In that case, the court merely applied the terms of an extradition treaty with Venezuela with the blessing of the State Department and at the behest of the Venezuelan Government, to permit Venezuela to prosecute a former government official. The court's holding that the Act of State doctrine did not bar the action therefore correctly anticipated the foreign relations foundations of the doctrine later announced in *Sabbatino*, since both governments affected by the action desired its prosecution. Moreover, *Sabbatino* held that the Act of State doctrine was applicable only in the absence of a treaty. 376 U.S. at 428. The court's statement that common crimes committed by a foreign government official are not Acts of State which could avoid his extradition and prosecution, relied on by petitioners (Petition at 25), is beside the point here for an additional reason: as discussed above, the Act of State in the instant case is the granting of the concession, not the alleged acceptance of bribes.

Nor can the existence of a "corruption exception" to the Act of State doctrine be supported by *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981). The court in *Sage* held that the Act of State doctrine did not bar plaintiffs' complaint, because only the purchasing decisions of sales agents utilized by foreign governments, not any acts of a foreign sovereign, were at issue, and because the alleged wrongful conduct related principally to the domestic actions of the defendant. The court expressly declined to decide whether allegations of corruption would avoid the Act of State doctrine, because no such allegations were made in that case. The court concluded that "final resolution of whether, if allegations of corruption were made, the Act of State Doctrine could be avoided is not necessary at this time." 534 F. Supp. at 910. The Ninth Circuit thus properly recognized below that the district court's language in *Sage* on which petitioners rely

(Petition at 25) was mere *dictum.* 712 F.2d at 408, n.3; App. A at 19-20.

Finally, petitioners cite two other cases, *Habib v. Raytheon Co.,* 616 F.2d 1204 (D.C. Cir. 1980) and *Sedco International, S.A. v. Cory,* 522 F.Supp. 254 (S.D. Iowa 1981), *aff'd,* 683 F.2d 1201 (8th Cir.), *cert. denied,* 103 S.Ct 379 (1982), to illustrate that "courts have heard a variety of claims involving foreign bribery." Petition at 26. Neither case is on point. While the D.C. Circuit did observe in *dictum* in *Habib* that illegal payments might be an issue at trial of that case, and while the district court in *Sedco* evidently did hear evidence of bribery, there is no indication that the parties raised the Act of State doctrine in either case or that the courts considered whether the doctrine might apply. Neither opinion makes any reference to the Act of State doctrine. These cases therefore cannot be used as authorities on whether the doctrine requires dismissal of a case in which it has been properly raised, as defendants did in this case.

The Ninth Circuit was thus correct that there is no truly supportive authority for a "corruption exception" to the Act of State doctrine.

IV. BECAUSE THIS CASE CONCERNS SOVEREIGN ACTIONS, CERTIORARI TO CONSIDER A COMMERCIAL EXCEPTION TO THE ACT OF STATE DOCTRINE IS NOT WARRANTED.

Petitioners argue that a commercial exception to the Act of State doctrine avoids its application in this case. Petition at 27-33. While the existence of such a commercial exception is problematical,[5] that issue is not presented by this case. The Ninth Circuit saw no reason to reach the

[5] Neither in *Alfred Dunhill of London, Inc. v. Republic of Cuba, supra,* nor in any other Supreme Court case has a majority of the Court recognized a "commercial exception" to the Act of State doctrine. Four justices voted for the exception in *Dunhill,* while five did not. The purported commercial exception has not formed the basis of a holding in any case from any jurisdiction.

question since it correctly held that petitioners' case does not involve commercial conduct, but rather the exercise of power peculiar to a sovereign. 712 F.2d at 408; App. A at 18-19.

In granting a concession to explore for and extract oil in its sovereign territory, Umm al Qaywayn was not operating an oil business in anything like the sense that Cuba was operating a cigar business in the *Dunhill* case. Though the grantee of the concession was a private oil company, the grantor was the sovereign doing what only a sovereign can do — exercising dominion over its natural resources. In *United States v. California*, 332 U.S. 19, *reh. denied*, 332 U.S. 787 (1947), this Court determined that only the national government has power to grant leases to exploit offshore petroleum deposits. The Court found invalid offshore leases granted by the State of California, holding that dominion over petroleum and other mineral deposits located offshore a nation's territory but within its three-mile zone (as then claimed by the United States) necessarily lay with the national government alone. 332 U.S. at 38-39. The Ninth Circuit likewise reasoned in *International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, *supra*, that this country and other nations support the principle of supreme state sovereignty over natural resources, 649 F.2d at 1361, and that the sovereignty of the middle eastern oil producing nations "cannot be separated from their near total dependence on oil." *Id.* at 1358.

Thus, even if a "commercial exception" to the Act of State doctrine were recognized by this Court, the sovereign acts at issue here would not fall within it. The Ninth Circuit's decision on this point does not present any important question of federal law which should be settled by this Court.

V. CONCLUSION.

For the foregoing reasons, the Court should deny the Petition For Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

APPENDIX F

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

[illegible] PETROLEUM CORPORATION and [illegible] CLAYMAN, Plaintiffs, vs. OCCIDENTAL PETROLEUM CORPORATION OCCIDENTAL OF UMM al QUWAIN, INC. and ARMAND HAMMER, Defendants.	No. 79 03845 RMT (Kx COMPLAINT for Antitrust Violations

Plaintiffs, complaining of defendants jointly and severally, allege as follows:

JURISDICTION AND VENUE

1. This litigation arises under Section 1 of the Sherman Act [15 U.S.C. §1], Section 2(c) of the Robinson-Patman Act [15 U.S.C. §13(c)], California Business and Professions Code Section 16720, California Business and Professions Code Section 17045, and the common law.

2. This Court has jurisdiction of this litigation

(1)

pursuant to 15 U.S.C. §15, 15 U.S.C. §22, 28 U.S.C. §1331, 28 U.S.C. §1332, and the principles of pendent jurisdiction.

3. Defendants and each of them reside in, or are doing business in, the Central District of California, and the acts, omissions, practices and course of conduct, alleged herein took place in the Central District of California.

THE PARTIES

4. Plaintiff, CLAYCO PETROLEUM CORPORATION ("CLAYCO") is and was at all times relevant to this action a corporation organized and existing pursuant to the laws of the State of Delaware and having its principal place of business in the State of New York. CLAYCO is and was at all times relevant hereto engaged in interstate and foreign commerce.

5. Plaintiff, BRUCE CLAYMAN ("CLAYMAN") is and was at all times relevant to this action a citizen and resident of the State of New York.

6. Defendant, OCCIDENTAL PETROLEUM CORPORATION ("OCCIDENTAL") is and was at all times relevant to this action a corporation organized and existing pursuant to the laws of the State of California and having its principal place of business in the State of California. OCCIDENTAL is and was at all times relevant hereto engaged in interstate and foreign commerce.

7. Defendant OCCIDENTAL of UMM al QUWAIN, INC. is and was at all times relevant hereto a corporation organized and existing pursuant to the laws of the State of California

and having its principal place of business in the State of California. OCCIDENTAL of UMM al QUWAIN, INC. is and was at all times relevant hereto a wholly owned subsidiary and agent of OCCIDENTAL and engaged in interstate and foreign commerce.

8. Defendant, ARMAND HAMMER, is and was at all times relevant to this action the chief executive officer of OCCIDENTAL and a resident of the State of California.

THE CAUSE OF ACTION

9. CLAYCO was formed by CLAYMAN in June 1969, for the purpose of engaging in the acquisition, exploration, and development of interests in undeveloped oil, gas and other mineral land acreage on an international basis.

10. In August 1969, CLAYMAN learned that certain oil and gas concessions located on and off the shore of the Sheikhdoms of Ajamn, Dubai, Shatjah and Umm al Quwain, located on the Trucial Coast of the Persian Gulf, were available to be purchased.

11. In approximately August 1969, CLAYMAN and CLAYCO directly and through their agents began negotiations with Sheikh Ahmed al Mualla ("SHEIKH AHMED"), the ruler of Umm al Quwain directly and through his son Sheikh Sultan bin Ahmed Mullah ("SHEIKH SULTAN"), to acquire an off-shore oil and gas concession in the territorial waters of Umm al Quwain (hereinafter the "Concession").

12. In or about September 1969, SHEIKH AHMED agreed that CLAYMAN and CLAYCO would be awarded the Concession upon CLAYCO's submission of a bid commensurate with those previously

received by SHEIKH AHMED.

13. On or about November 19, 1969, the Concession was obtained from SHEIKH AHMED by OCCIDENTAL of UMM al QUWAIN, INC. Plaintiffs are informed and believe that this Concession had a value of One Hundred Million ($100,000,000.00) Dollars.

14. Plaintiffs are informed and believe that at or about the time the Concession was awarded to OCCIDENTAL of UMM al QUWAIN, INC.:

(a) ARMAND HAMMER delivered a secret payment of Two Hundred Seventeen Thousand ($217,000.00) Dollars to SHEIKH SULTAN in a London hotel room for the purpose of inducing him and his father to award the Concession to OCCIDENTAL of UMM al QUWAIN, INC. and not to CLAYMAN and CLAYCO;

(b) OCCIDENTAL spent approximately Thirteen Thousand ($13,000.00) Dollars to entertain SHEIKH SULTAN on two occasions in London for the purpose of inducing him and his father to award the Concession to OCCIDENTAL of UMM al QUWAIN, INC. and not to CLAYMAN and CLAYCO;

(c) An agent of OCCIDENTAL delivered an additional secret payment of Two Hundred Thousand ($200,000.00) Dollars to SHEIKH SULTAN in Switzerland for the purpose of inducing him and his father to award the Concession to OCCIDENTAL of UMM al QUWAIN, INC. rather than to CLAYMAN and CLAYCO.

15. Due to defendants fraudulent concealment of the payments described in Paragraph 14, plaintiffs were not aware

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of those payments until on or about December 11, 1978, when newspaper accounts disclosed the existence of and nature of said payments.

FIRST CLAIM

16. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, set forth above.

17. This First Claim is based upon Section 1 of the Sherman Act, 15 U.S.C. §1.

18. By means of the payments set forth above in Paragraph 14, defendants entered into a contract, combination, and conspiracy in restraint of foreign trade.

19. As a direct and proximate result of the wrongful conduct alleged herein, plaintiffs have been injured in their business. Therefore, plaintiffs are entitled to recover from defendants three times the damages they have sustained together with costs of suit and reasonable attorneys' fees pursuant to 15 U.S.C. §15.

SECOND CLAIM

20. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, as set forth above.

21. This Second Claim is based upon Section 2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c).

22. All of the payments referred to in Paragraph 14 were made in secret by defendants.

23. Neither SHEIKH AHMED nor SHEIKH SULTAN rendered any legitimate services to OCCIDENTAL in exchange for the aforementioned payments.

24. As a direct and proximate result of the payments described in Paragraph 14 above, plaintiffs were prevented from acquiring the Concession which plaintiffs are informed and believe had a value of One Hundred Million ($100,000,000.00) Dollars and thus, were injured in their business. Therefore, plaintiffs are entitled to recover from defendants three times the damages they have sustained together with costs of suit and reasonable attorneys' fees pursuant to 15 U.S.C. §15.

THIRD CLAIM

25. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, as set forth above.

26. This Third Claim is based upon California Business and Professions Code Section 16720.

27. As a direct and proximate result of defendants payments to SHEIKH SULTAN as set forth in Paragraph 14 above, plaintiffs were prevented from obtaining the Concession. As a result, the acts of defendants created a restriction in trade and prevented competition in the purchase and sale of oil and gas concessions.

28. Plaintiffs are, therefore, entitled to recover from defendants three times the damages sustained by them as a result of defendants' conduct together with reasonable attorneys'

fees and costs of suit pursuant to California Business and Professions Code Section 16750.

FOURTH CLAIM

29. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, as set forth above.

30. This Fourth Claim is based upon California Business and Professions Code Section 17045.

31. All of the payments referred to in Paragraph 14 were made in secret by defendants.

32. As a direct and proximate result of the payments referred to in Paragraph 14 above, plaintiffs were injured in that they were deprived of the opportunity to obtain the Concession. The payments also tended to destroy competition in the purchase and sale of oil and gas concessions.

33. Plaintiffs are, therefore, entitled to recover from defendants three times the damages sustained as a result of defendants' conduct together with reasonable attorneys' fees and costs of suit pursuant to California Business and Professions Code Section 17082.

FIFTH CLAIM

34. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, as set forth above.

35. Prior to the payments referred to in Paragraph 14 above, plaintiffs and SHEIKH AHMED and SHEIKH SULTAN had a

business relationship which would probably have resulted in economic benefit to plaintiffs.

36. Plaintiffs are informed and believe that at all times relevant hereto defendants were aware of the business relationship between plaintiffs and SHEIKH AHMED and SHEIKH SULTAN

37. Plaintiffs are informed and believe that defendants made the payments to SHEIKH SULTAN set forth in Paragraph 14 to intentionally disrupt and interfere with the business relationship between plaintiffs and SHEIKH AHMED and SHEIKH SULTAN and the prospective economic advantage to be derived therefrom by plaintiff.

38. As a direct and proximate result of the payments referred to in Paragraph 14, the business relationship between plaintiffs and SHEIKH AHMED and SHEIKH SULTAN was disrupted and plaintiffs were deprived of probable economic benefits.

39. Therefore, plaintiffs are entitled to recover from defendants One Hundred Million ($100,000,000.00) Dollars.

SIXTH CLAIM

40. Plaintiffs reallege and incorporate by reference herein each and every allegation contained in paragraphs 1 through 14, inclusive, as set forth above.

41. Defendants and each of them did the things herein alleged wilfully and knowingly, maliciously and oppressively, for the purpose of damaging plaintiffs and each of them in their lawful business. In addition, the payments alleged herein were secretly and corruptly made, concealed from plaintiffs,

concealed from defendants' shareholders, concealed from defendants' auditors, and the public at large with the intent to defraud plaintiffs into believing that said concessions were obtained by defendants without benefit of said payments. Plaintiffs therefore are entitled to exemplary and punitive damages in the amount of Two Hundred Million ($200,000,000.00) Dollars.

PRAYER FOR RELIEF

42. WHEREFORE, plaintiffs pray as follows:

(a) That with respect to the First Claim, this Court award plaintiffs Three Hundred Million ($300,000,000.00) Dollars in damages, together with costs of suit and reasonable attorneys' fees;

(b) That with respect to the Second Claim, this Court award plaintiffs Three Hundred Million ($300,000,000.00) Dollars in damages, together with costs of suit and reasonable attorneys' fees;

(c) That with respect to the Third Claim, this Court award plaintiffs Three Hundred Million ($300,000,000.00) Dollars in damages, together with costs of suit and reasonable attorneys' fees;

(d) That with respect to the Fourth Claim, this Court award plaintiffs Three Hundred Million ($300,000,000.00) Dollars in damages, together with costs of suit and reasonable attorneys' fees;

(e) That with respect to the Fifth Claim, this Court award plaintiffs One Hundred Million ($100,000,000.00) Dollars

in damages;

(f) That with respect to the Sixth Claim, this Court award plaintiffs Two Hundred Million ($200,000,000.00) Dollars in damages; and

(g) That this Court order such other and further relief as it may deem proper.

DATED: September 17, 1979.

BOOTH, LIPTON & LIPTON

BELLI & CHOULOS

By: _____
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APPENDIX G

O'MELVENY & MYERS

March 2nd 1982

631,480-238

The Honorable Davis R. Robinson
Legal Advisor
Department of State
Washington, D.C. 20520

Dear Mr. Robinson:

We are counsel to Occidental Petroleum Corporation in a private antitrust suit now pending before the United States Court of Appeals for the Ninth Circuit, Clayco Petroleum Corp. v. Occidental Petroleum Corp., No. 80-5657. In connection with consideration of Clayco's appeal, the Court of Appeals has asked us for supplemental briefing on a series of questions related to enforcement of the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA").

In response to the Court's questions, it will be important for us to discuss the extent to which the Justice Department and the SEC coordinate their enforcement activities under the FCPA with the Department of State. Based upon our conversations with Jeff Smith, Assistant Legal Advisor, and others, it is our understanding that the Departments of State and Justice have adopted a practice under which the Justice Department notifies the State Department in advance of taking any public action, civil or criminal, to enforce the FCPA. As we understand it, this policy is intended to serve two purposes: to give the State Department the opportunity to notify the affected foreign

government in advance of any enforcement action, and thereby minimize any resulting strains on our foreign relations; and to give the State Department the opportunity to raise with the Justice Department any foreign relations concerns that it may have about the wisdom of a particular enforcement action before that action is brought. We understand that the State Department is similarly consulted in connection with SEC enforcement actions under the FCPA.

We are not aware of any published document which adequately describes these FCPA enforcement policies. In order to be sure that our facts are accurate and that we have the correct information in a form which we may present to the Court of Appeals, we would appreciate it if you could provide us with a description and explanation of the practice of notification and/or consultation with the State Department followed by the Justice Department and the SEC in advance of bringing any FCPA enforcement action, and the purposes served by these policies.

Our brief is due in the Court of Appeals on March 22, and will necessarily have to be completed several days before that in order to be printed. Your prompt attention to our request would be greatly appreciated.

Very truly yours

Philip F. Westbrook
of O'MELVENY & MYERS

PFW:lc

cc: Jeffrey H. Smith, Esq.
Assistant Legal Advisor

DEPARTMENT OF STATE

Washington, D.C. 20520

March 18, 1982

Mr. Philip F. Westbrook
O'Melveny & Meyers
611 West Sixth Street
Los Angeles, CA 90017

Dear Mr. Westbrook:

The Legal Adviser has asked that I reply to your letter to him of March 2, 1982 concerning coordination between the Department of State, the Department of Justice and the Securities and Exchange Commission (the "SEC") with respect to enforcement activities under the bribery provisions of the Foreign Corrupt Practices Act of 1977 (the "FCPA").

The Department of State's role in the coordination process does not appear in detail in any published document. It is the practice of the Justice Department, whenever possible, to notify the State Department in advance of taking any public enforcement action under the FCPA. The Justice Department also notifies the State Department when it becomes aware of impending actions by others which may result in premature public disclosure of information relating to an active FCPA investigation or prosecution.

This practice is intended to serve two purposes: first, to give the State Department the opportunity to notify, if appropriate, the affected foreign government in advance of any enforcement action or other action which might result in public disclosure; and, second, to give the State Department an opportunity to inform the Justice Department of the foreign relations context in which the enforcement action arises.

The State Department is generally notified in a similar manner with regard to cases involving the SEC's civil enforcement authority under the FCPA.

I trust this information will be helpful.

Sincerely yours,

Daniel W. McGovern
Deputy Legal Adviser

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